

Fein: Comment on Mathias

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COMMENT

BRUCE E. FEIN*

Over a century ago, Lord Gladstone lionized the United States Constitution as “the most wonderful work ever struck off at a given time by the brain and purpose of man.”¹ The Constitution, however, is not self-executing. Its intellectual sinews must be continually exercised and tested to insure fidelity to the Constitution’s political philosophy, especially its checks and balances among rival branches of government. As John Stuart Mill noted in *On Liberty*,² creeds of all kinds are wont to a passive death unless they are received actively, with a lively apprehension of the truths which they extol. If the Constitution is to live for the ages, its bedrock principles must be actively understood and vigorously debated.

The bicentennial of the Constitution is a fitting occasion for lawyers to explore what should be the legal standards for its interpretation and whether errant standards are the source of malfunctioning in the federal judiciary. Attorneys who stand aloof or ignorant of fundamental constitutional disputes endanger the public interest. During the Reconstruction era, for example, our Constitution was repeatedly defiled by the radical Reconstruction Congresses because of attorney indifference to constitutional principles. As Secretary of the Navy Gideon Welles then remonstrated:

It is unfortunate for the country that there is such a preponderance of lawyers in our public councils. Their technical training and extensive, absorbing practice unfit them to be statesmen. They are ready to take either side of a case for a fee, and will labor as earnestly for the side they know to be wrong as for the right. Their influence is often bad. They will, for party ends, warp and pervert the plainest provisions of the Constitution.³

Contemporary federal courts are flooded with imaginative constitutional claims largely because the United States Supreme Court and most subordinate federal judges have disavowed the under-

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1. Gladstone, *Kin Beyond Sea*, N. AM. REV., Sept.-Oct. 1878, at 185.

2. J.S. MILL, *ON LIBERTY* (G. Himmelfarb ed. 1976).

3. 3 THE DIARY OF GIDEON WELLES 480-81 (Houghton-Mifflin 1911).

standing of the Constitution's authors that constitutional interpretation would be controlled by the intent or purpose of each provision. Justices William J. Brennan, Jr. and John Paul Stevens, for instance, have disputed the theory of original intent in extra-judicial pronouncements. Justice Brennan recently maintained:

[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time.⁴

In other words—to borrow from the brilliant characterization of Solicitor General Charles Fried—Brennan, Stevens, and their followers champion the idea that the contemporary constitutional text is but a “homonym” of the original document.⁵

The argument over the original-intent standard for constitutional interpretation is at bottom a dispute over the magnitude of policymaking power that should be entrusted to an appointed, life-tenured federal judiciary under a Constitution in which government by elected representatives is the norm. When the intent of our constitutional authors does not govern judicial interpretation, individual judges invariably smuggle their idiosyncratic notions of wise public policy into constitutional decrees. What, for instance, are *Roe v. Wade*⁶ and sequel ukases of the Supreme Court other than judicial assertions that permitting women to abort fetuses would commend itself to an enlightened community? The constitutional right of privacy conjured up by the Supreme Court was more the product of judicial imagination than of cogitation, and has led to such absurd conclusions as equating the interest of the father in a prospective childbirth with the interest of the state.

Clear and convincing evidence confirms that the doctrine of original intent is the only legitimate judicial guide for constitutional jurisprudence. The doctrine was embraced by James Madison, “Father of the Constitution,” and his political and intellectual companions, Thomas Jefferson and Alexander Hamilton. Madison lectured that if “the sense in which the Constitution was accepted and ratified

4. W. Brennan, *The Constitution of the United States: Contemporary Ratification* 7 (Oct. 12, 1985) (lecture delivered at Text and Teaching Symposium, Georgetown University) (available at the *Maryland Law Review*).

5. Fried, *Sonnet LXV and the “Black Ink” of the Framers’ Intention*, 100 HARV. L. REV. 751, 757 (1987).

6. 410 U.S. 113 (1973).

by the nation . . . be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers."⁷ And Jefferson admonished that "[o]ur peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction. . . . Let us go then perfecting it by adding, by way of amendment to the Constitution, those powers which time and truth show are wanting."⁸

Open-ended interpretation of the Constitution is also incompatible with the vision of the judicial function etched by Alexander Hamilton. In *The Federalist* No. 78 Hamilton labeled as misconduct the substitution of judicial will for "the constitutional intentions of the legislature."⁹ If the courts were "disposed to exercise WILL instead of JUDGMENT, the consequence would . . . be the substitution of their pleasure to that of the legislative body."¹⁰

Hamilton further remarked on the need to curb "an arbitrary discretion in the courts" by tying the courts "down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."¹¹ The intent theory of constitutional interpretation achieves the goal of circumscribing judicial discretion by providing strict rules to inform courts, whereas theories based on something other than intent invite whimsical judicial interpretations.

Further, in *The Federalist* No. 81, Hamilton denies the charge that "[t]he power of construing the laws, according to the *spirit* of the constitution, will enable [the Supreme Court] to mould them into whatever shape it may think proper; especially as its decisions will not be in any matter subject to the revision or correction of the legislative body."¹² Hamilton avows that "there is not a syllable" in the Constitution that empowers the federal courts to interpret that instrument according to its "spirit," or gives them an interpretive latitude broader than that possessed by state courts.¹³

Neither Madison nor Jefferson nor Hamilton was engaged in an intellectual frolic. Their views regarding original intent were embraced by two legal giants who dominated the Supreme Court for one-third of a century: Chief Justice John Marshall and Associate

7. See THE WRITINGS OF JAMES MADISON 911 (G. Hunt ed. 1900-1910).

8. Letter from Thomas Jefferson to Wilson Nicholas (Sept. 7, 1803), reprinted in 10 THE WORKS OF THOMAS JEFFERSON 10-11 (P. Ford ed. 1904-1905).

9. THE FEDERALIST No. 78, at 526 (A. Hamilton) (J. Cooke ed. 1961).

10. *Id.*

11. *Id.* at 529.

12. THE FEDERALIST No. 81, at 542 (A. Hamilton) (J. Cooke ed. 1961).

13. *Id.* at 543.

Justice Joseph Story. Chief Justice Marshall explained in *Gibbons v. Ogden*:¹⁴

The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said. . . . [W]e know of no rules for construing [the Constitution] other than are given by the language of the instrument . . . taken in connection with the purpose for which [federal powers] were conferred.¹⁵

Justice Story echoed Marshall's theory of constitutional interpretation. He taught:

In construing the Constitution of the United States, we are in the first instance to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole and also viewed in its component parts. Where its words are plain, clear and determinate, they require no interpretation. . . . Where the words admit of two senses, each of which is conformable to general usage, that sense is to be adopted, which without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.¹⁶

The doctrine of original intent does not limit judicial interpretation to addressing only the specific evils that animated the framers when the clause under consideration was introduced into the Constitution. As Chief Justice Marshall elaborated in *Dartmouth College v. Woodward*:¹⁷

It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, so it would have been made a special exception.¹⁸

The opinions of Madison, Jefferson, Hamilton, Marshall, and Story are entitled to great weight in the original intent debate. Not only were they acknowledged political and judicial giants, but their

14. 22 U.S. (9 Wheat.) 1 (1824).

15. *Id.* at 18.

16. J. STORY, COMMENTARIES ON THE CONSTITUTION (1870).

17. 17 U.S. (4 Wheat.) 518 (1819).

18. *Id.* at 643.

lives were contemporaneous with the Constitution's birth. The quintet is thus more likely than later generations to have correctly discerned tacit or express political understandings regarding the intended standard for constitutional interpretation.

The common criticisms of the original intent theory are answerable. It is said that the Constitution cannot be adapted to changing circumstances and unforeseen technology if shackled by original intent. And Chief Justice Marshall, it is noted, recognized in *McCulloch v. Maryland*¹⁹ that the founding fathers intended the Constitution to endure for ages to come and to address unforeseeable crises in human affairs.

Marshall's words, however, were uttered in conjunction with a defense of the broad powers of *Congress*, not the courts, to address new problems by enacting laws under the necessary and proper clause of article I.²⁰ That clause, coupled with congressional power over interstate commerce, the general welfare clause, the fourteenth amendment, and other provisions, enables the Nation's legal matrix to respond to unanticipated developments without doing violence to the original intent theory. Any doubters should be convinced by a visual examination of the mountainous legal volumes comprising the United States Code and the Code of Federal Regulation.

Furthermore, the process for amending the Constitution was the intended method for insuring against antiquation, as opposed to judicial renunciation of the doctrine of original intent. Indeed, the initial task of the First Congress was to propose constitutional amendments styled the Bill of Rights to check the powers of the federal government. James Madison, a primary author of the Bill of Rights, certainly did not believe its protections might have been created by the Supreme Court through inventive constitutional interpretation.

Constitutional amendments, moreover, are not invariably lead-footed. The Bill of Rights was ratified in less than two years, the eleventh amendment in less than one year, and the thirteenth amendment abolishing slavery in approximately ten months. Most recently, the eighteen-year-old voting rights amendment²¹ was ratified in thirteen weeks. Thus, it is wrong to slight the power of amendment as too sluggish for practical utility.

Considered together, the legislative powers of Congress and

19. 17 U.S. (4 Wheat.) 316 (1819).

20. See *id.* at 353-59.

21. U.S. CONST. amend. XXVI.

the amending power discredit the argument that we cannot enjoy both a "living Constitution" and the doctrine of original intent for its construction.

A second argument against original intent is that its discovery is too difficult. Justice Brennan articulated the criticism in this way:

It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment such as records of the ratification debates provide spurious or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. Indeed, it is far from clear whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the state?—or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from the general assent of the states.²²

Each of Brennan's quarrels with original intent is flawed. If the history or debate surrounding a constitutional clause is sparse or unedifying, then prime reliance should be placed on explicit constitutional text. That language is to be read with reference to its accepted meaning in Anglo-American common law. As the Supreme Court acknowledged in 1925, when the founding fathers "came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood."²³ And if the common-law meaning of the constitutional text is inconclusive, then the interpretation most harmonious with the nature, projects, scope, and design of the Constitution should be embraced.

Justice Brennan exaggerates the prevalence of significant ambiguity in ascertaining original intent. Notes of the Constitutional Convention and state ratification debates are frequently illuminating. The President's pardon power, for instance, was clearly fashioned to enable its use before a criminal conviction. In addition, *The Federalist Papers*²⁴ and the Anti-Federalist pamphlets²⁵ lend fuller un-

22. W. Brennan, *supra* note 4, at 4.

23. *Ex parte Grossman*, 267 U.S. 87, 109 (1925).

24. For a commonly cited edition of this collection of essays by James Madison, Alexander Hamilton, and John Jay, see *THE FEDERALIST* (J. Cooke ed. 1961).

derstanding of the Constitution's structure and particular clauses. The actions of the First Congress and the constellation of state laws in place when the Constitution was adopted are also informative. It is improbable that the Constitution was intended to invalidate state laws that were commonplace in 1787 without explicit debate of the matter. Similarly, it is unlikely that the First Congress, numbering among its leaders those who had been members of the Constitutional Convention, would have enacted laws, such as the death penalty for treason, at war with original intent without encountering heated dissent.

In searching for original intent, if the drafters, congressional disputants, or ratifiers voiced conflicting or elliptical views, then the constitutional text should be dispositive, read in light of its accepted common-law meaning. It was the text, after all, that was ultimately agreed upon by the participants in forging and ratifying the Constitution.

Concededly, there may be occasions when two different judges, both genuinely dedicated to interpretation by original intent, may disagree because constitutional history or text is equivocal. But these disagreements as to constitutional meaning are likely to be small and pose no threat to a coherent, predictable constitutional jurisprudence. The majority of cases addressed under an original intent banner are akin to deciding whether New York City is geographically nearer to Boston than to San Francisco, a process leaving considerable latitude for imprecise calculation. Moreover, the sincere use of original intent as the interpretive touchstone narrowly circumscribes the range of judicial outcomes in a way that makes the Constitution a government of laws, not of men.

Some argue a special case for judicial power to interpret the fourteenth amendment. It is urged that the due process and equal protection clauses of the amendment were intentionally nebulous so as to invite the Supreme Court to expound the provisions as the Justices thought would be wise and enlightened. Due process of law, however, had a defined, crystallized common-law meaning. As Alexander Hamilton declared on the eve of the Convention: "The words 'due process' have a *precise technical* import, and are *only* applicable to the process and proceedings of courts of justice; *they can never be referred to the act of the legislature.*"²⁵ And according to the

25. For a recent one-volume compilation of Anti-Federalist writings, see *THE ANTI-FEDERALIST* (H. Storing ed. & M. Dry abr. 1985).

26. *THE PAPERS OF ALEXANDER HAMILTON* 35 (H. Syrett & J. Cooke ed. 1962).

Supreme Court in *Hurtado v. California*,²⁷ when due process was embodied in the fourteenth amendment, it was used in the same sense and to no greater effect than was its use in the Bill of Rights ratified in 1791.

The due process clause of the fourteenth amendment was further clarified by subsequent action in Congress. In 1875, for instance, Congressman James G. Blaine proposed a constitutional amendment prohibiting any state from making "any law respecting an establishment of religion or prohibiting the free exercise thereof."²⁸ Blaine and twenty-three other members of the 1875 Congress were part of the Congress that framed the fourteenth amendment. Their views were fortified by an 1875 declaration of Chief Justice Waite in *United States v. Cruikshank*²⁹ that the due process clause did not incorporate the first amendment right to assembly.

The evidence is overwhelming that the framers of the fourteenth amendment did not conceive of the due process clause as an open-ended grant of power to the Supreme Court to apply the Bill of Rights to the states, either wholesale or retail. Section 5 of the fourteenth amendment reinforces this conclusion. It deposes Congress, not the courts, as its primary enforcer, a fact emphasized by Justice Miller in the *Slaughter-House Cases*.³⁰

Congress profoundly distrusted the Supreme Court during the time when the fourteenth amendment was adopted and ratified. The Court's ruling in *Dred Scott v. Sandford*³¹ was anathema to the Reconstruction Congress. And the Court's twin rulings in the Test Oath Cases, its defense of President Andrew Johnson's pardon power in *United States v. Klein*,³² and its refusal to compel President Johnson to enforce the Reconstruction Acts in *Mississippi v. Johnson*,³³ further sullied its reputation in Congress. It blinks reality to believe that the Reconstruction Congress, so hostile to the Supreme Court, would nevertheless have endowed it with unbridled discretion to interpret the due process or equal protection clauses of the fourteenth amendment.

Despite its historical record, the due process clause of the four-

27. 110 U.S. 516, 534-35 (1884).

28. CONG. GLOBE, Cong., 2d Sess. (1876).

29. 92 U.S. 542, 552 (1875).

30. 83 U.S. (16 Wall.) 36, 81 (1873).

31. 60 U.S. (19 How.) 393 (1856).

32. 80 U.S. (13 Wall.) 128 (1872).

33. 71 U.S. (4 Wall.) 475 (1866).

teenth amendment has been employed by the Supreme Court since 1897 to incorporate many provisions of the Bill of Rights to restrict state power: the first amendment;³⁴ the fourth amendment;³⁵ the fifth amendment prohibitions against compulsory self-incrimination and double jeopardy, and the taking of private property for a public purpose without just compensation;³⁶ the sixth amendment rights to jury trial, counsel, compulsory process, and cross-examination;³⁷ and the eighth amendment ban on cruel and unusual punishments.³⁸ It would militate against the desired stability of legal doctrine if these cases were brought under the flag of original intent. Generally the decisions have received community acceptability, notwithstanding the Court's flawed reasoning.

Original intent theory, however, retains contemporary fourteenth amendment significance. Several provisions of the Bill of Rights have not as yet been applied to states by the Supreme Court under the incorporation theory: the second amendment right to bear arms; the fifth amendment requirement of grand jury indictments to initiate criminal prosecutions; the seventh amendment right to civil jury trials; and the eighth amendment prohibition of excessive bail. Fidelity to the fourteenth amendment and an understanding of the original intent theory should strengthen the Court's resolve to resist any further incorporation doctrine decrees.

Like the due process clause, the equal protection clause was not intended by its authors as a gelatinous phrase to be reshaped by judicial caprice or perceptions of social fairness. The primary if not exclusive purpose of the clause was to safeguard against invidious racial discrimination. As Justice Miller wrote in the *Slaughter-House Cases*:

34. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (establishment clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free enterprise clause); *Hague v. Committee for Industrial Reorganization*, 307 U.S. 496 (1939) (freedom of petition); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Near v. Minnesota*, 283 U.S. 697 (1931) (free press); *Gitlow v. New York*, 268 U.S. 652 (1925) (free speech).

35. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule applicable to states); *Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating fourth amendment, but holding states not bound by exclusionary rule).

36. See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination); *Palko v. Connecticut*, 302 U.S. 319 (1937) (double jeopardy); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897) (condemnation of private property).

37. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to appointed counsel); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confrontation).

38. See, e.g., *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.³⁹

Even before ratification of the fourteenth amendment, Congress granted a municipal franchise to blacks in the District of Columbia.⁴⁰

The original intent doctrine is said by some to be inconsistent with the Supreme Court's primary mission as a protector of minority rights. James Madison, they note, applauded the Bill of Rights because the "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."⁴¹ But Madison's praise of the judiciary was limited to its defense of expressly stipulated rights, not judicially invented ones.

In addition, the individual right to vote for elected officials is hollow if the Supreme Court can invalidate, under the banner of minority rights, the policies and laws preferred by the majority. The whole purpose of elections is to subordinate the wishes of political minorities to political majorities, subject to the express and intended restraints on majoritarianism incorporated in the Constitution.

The founding fathers, moreover, engineered a system of separated and diffuse nonjudicial authorities to prevent oppressive legislation. The Congress is bicameral. Members of the House of Representatives serve two-year terms and represent districts that embrace many discrete and frequently antagonistic political factions. House members are apportioned among the states on the basis of population.

In contrast, each state is entitled to two Senators, who are elected from statewide constituencies for six-year terms. Senate terms are staggered to prevent an impulsive public sentiment from dominating congressional action through a single biennial election. Before ratification of the seventeenth amendment,⁴² Senators were insulated from public will through election by state legislatures.

The President is elected for a four-year term from fifty varied

39. 83 U.S. (16 Wall.) 36, 81 (1873).

40. Act of January 8, 1867, ch. 6, § 1, 14 Stat. 375.

41. See 1 ANNALS OF CONG. 439 (1789).

42. U.S. CONST. amend. XVII (providing for the popular election of Senators).

state constituencies and the District of Columbia. Presidential veto authority can check improvident or ill-humored congressional action. On the other hand, members of Congress can serve indefinitely, while the twenty-second amendment limits a President to two terms.⁴³

As an auxiliary precaution against abuse of government authority, the Constitution preserved large domains of policymaking for the states. As Thomas Jefferson observed, "[T]he true barriers of our liberty in this country are our state governments; and the wisest conservative power ever contrived by man, is that which our Revolution and present government found us possessed."⁴⁴

The Constitution's nonjudicial strategy to protect against legislative oppression has enjoyed mixed success. In the area of race relations, for instance, laws that proliferated in the aftermath of Reconstruction blatantly discriminated against blacks. On the other hand, since 1948 the Nation has witnessed President Truman's desegregation of the armed forces; Executive orders issued by Presidents Kennedy, Johnson, and Nixon mandating affirmative action programs aiding minorities and females by federal government contractors; the 1957, 1960, and 1964 Civil Rights Acts;⁴⁵ the Equal Pay Act of 1963;⁴⁶ the Voting Rights Act of 1965;⁴⁷ the 1967 Age Discrimination Act;⁴⁸ the 1968 Fair Housing Act;⁴⁹ Title IX of the 1972 Education Act Amendments;⁵⁰ the Equal Credit Opportunity Act;⁵¹ the Rehabilitation Act of 1973;⁵² the Developmentally Disabled Assistance and Bill of Rights Act;⁵³ the Education for All Handi-

43. U.S. CONST. amend. XXII (providing that no person shall be elected President more than twice, and no person who has served more than two years of another's term shall be elected more than once).

44. Letter from Thomas Jefferson to Destutt Tracy (Jan. 26, 1811), *reprinted in* D. MALONE, THOMAS JEFFERSON AND THE ORDEAL OF LIBERTY 394 (1962).

45. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at scattered sections of 5, 28, and 42 U.S.C. (1982)); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended at scattered sections of 18, 20, and 42 U.S.C. (1982)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at scattered sections of 28 and 42 U.S.C. (1982)).

46. 29 U.S.C. § 206 (1982 & Supp. III 1985).

47. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982 & Supp. III 1985).

48. 29 U.S.C. §§ 621-634 (1982 & Supp. III 1985).

49. 42 U.S.C. §§ 3601-3631 (1982 & Supp. III 1985).

50. 20 U.S.C. § 1681 (1982).

51. 15 U.S.C. §§ 1691-1691f (1982 & Supp. III 1985).

52. 29 U.S.C. §§ 701-796i (1982 & Supp. III 1985).

53. 42 U.S.C. §§ 6000-6081 (1982 & Supp. III 1985).

capped Children Act of 1975;⁵⁴ the ten-percent minority construction quota in the Public Works Employment Act of 1977;⁵⁵ and the Pregnancy Discrimination Act of 1978.⁵⁶ Political liberals applauded Congress for legislation that established a holiday to celebrate Martin Luther King's birthday,⁵⁷ increased funding for the Legal Services Corporation,⁵⁸ and augmented women's and minority rights in the Retirement Equity Act of 1984⁵⁹ and the Voting Accessibility for the Elderly and Handicapped Act.⁶⁰

In legislative assemblies today controversies generally swirl around whether minorities deserve preferences over nonminorities. Equal opportunity as a norm is virtually universally accepted.

It is thus wrong to conceive of the Supreme Court as the paramount and indispensable defense against oppressive majorities. Nonjudicial institutions play the primary role, with the courts making cameo appearances. As Justice Holmes observed, "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."⁶¹ Indeed, in the *Civil Rights Cases*⁶² the Supreme Court held unconstitutional the 1875 Civil Rights Act,⁶³ fashioned by Congress to protect blacks against racial discrimination in places of public accommodation. And, of course, *Plessy v. Ferguson*⁶⁴ gave constitutional benediction to scores of racially discriminatory laws.

Some maintain that even if the original intent theory is sound, its contemporary use is unacceptable because cornerstones of modern constitutional jurisprudence would be threatened. Some critics have argued that the original intent theory would occasion the overruling of *Brown v. Board of Education*,⁶⁵ the one person, one vote decisions,⁶⁶ decisions banning organized public school prayer,⁶⁷ the

54. Pub. L. No. 94-142, 89 Stat. 773 (codified at scattered sections of 20 U.S.C. (1982)).

55. 42 U.S.C. §§ 6701-6704(f) (1982).

56. 42 U.S.C. § 2000e(k) (1982).

57. 5 U.S.C. § 6103 (Supp. III 1985).

58. Pub. L. No. 99-500, § 101(b), 100 Stat. 1783-69 (1986).

59. 29 U.S.C. § 1001 (Supp. III 1985).

60. 42 U.S.C. §§ 1973ee to 1973ee-6 (Supp. III 1985).

61. *Missouri, Kansas & Texas R.R. v. May*, 194 U.S. 267, 270 (1904).

62. 109 U.S. 3 (1883).

63. 18 Stat. 335 (codified as amended at scattered sections of 18 and 28 U.S.C. (1982)).

64. 163 U.S. 537 (1896).

65. 347 U.S. 483 (1954).

66. *See, e.g.,* *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970) (election of school trustees); *Avery v. Midland County*, 390 U.S. 474 (1968) (election of county commissioners); *Reynolds v. Sims*, 377 U.S. 533 (1964) (election of state legislators); *Wesberry*

landmark abortion decree of *Roe v. Wade*,⁶⁸ and the celebrated *Miranda v. Arizona*⁶⁹ edicts governing custodial police interrogations. Furthermore, the Bill of Rights might be held generally inapplicable to the states by virtue of the due process mandate of the fourteenth amendment if the original doctrine were to dictate constitutional interpretation.

But apprehensions that the original intent theory would engender revolutionary changes in the Nation's jurisprudence and disturb settled expectations are unfounded. The values of continuity and predictability in the law, cloaked in the doctrine of stare decisis, would militate against a wholesale retroactive application of original intent theory to reverse long-standing constitutional pronouncements. Decisions of the Supreme Court should not, in the words of Justice Roberts, be tantamount to restricted railroad tickets, "good for this day and train only."⁷⁰

But stare decisis is not an invariable command. The Supreme Court has reversed over 250 prior rulings, including the *Plessy v. Ferguson*⁷¹ ruling sanctifying the separate but equal doctrine. The Nation's social or political fabric would not be threatened if *Roe v. Wade*,⁷² *Miranda v. Arizona*,⁷³ the one person, one vote principle,⁷⁴ or the ban on school prayer were reversed.⁷⁵ And even if *Brown v. Board of Education*⁷⁶ were overruled, a constitutional amendment prohibiting racial discrimination by government would surely be ratified almost instantaneously.

Moreover, if Supreme Court decrees offensive to the doctrine

v. Sanders, 376 U.S. 1 (1964) (election of congressional representatives); *Gray v. Sanders*, 372 U.S. 368 (1963) (election of state officials by weighted voting system).

67. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (daily moment of silence); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (classroom prayers and Bible readings); *Engel v. Vitale*, 370 U.S. 421 (1962) (recitation of officially promulgated prayer).

68. 410 U.S. 113 (1973).

69. 384 U.S. 436 (1966).

70. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

71. 163 U.S. 537 (1896).

72. 410 U.S. 113 (1973).

73. 384 U.S. 436 (1966).

74. The one person, one vote principle was invoked by the Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), to strike down an Alabama reapportionment scheme based on outdated census figures. The practical effect of using the outdated figures was to give a greater voice to individual voters in districts whose population had not grown as considerably as the population of other districts. Citing equal protection theory, the Court held that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.* at 568. See also cases cited *supra* note 66.

75. See cases cited *supra* note 67.

76. 347 U.S. 483 (1954).

of original intent reflect wise public policy, Congress and state legislatures can be expected to enact laws echoing such policies, even if they are no longer constitutional imperatives. Further, state courts interpreting state constitutions frequently protect rights that are not safeguarded by the United States Constitution. In recent years, over 350 state court decisions have proclaimed rights under state law that the United States Supreme Court has held unprotected by the federal constitution, especially in the areas of criminal law and equal educational opportunities.⁷⁷ The doctrine of original intent, therefore, does not presage a radical transformation of the prevailing legal landscape.

Those who assail the original intent theory proffer no substitute standard to constrain judicial whim or caprice in constitutional adjudication. Justice Brennan suggests that "the supremacy of the human dignity of every individual" should be the lodestar of constitutional construction.⁷⁸ But every Justice's concept of human dignity is personal. The concept leaves judicial discretion untethered. A human dignity standard permits judges to adjudicate according to their individual sense of fairness and wisdom. As Justice Benjamin Cardozo cautioned, "Benevolent judges empowered to adjudicate according to their individual sense of justice might produce a benevolent despotism, but such a regime would put an end to the reign of law."⁷⁹

The human dignity theory of constitutional jurisprudence also flouts the Constitution's separation of powers and system of checks and balances. Justices could manipulate the theory to achieve virtually any constitutional result they desired. Judicial omnipotence over public policy would be the consequence.

The founding fathers intended to check the power of all organs of government, including the Supreme Court. They were not Pollyannas, believing in a magnanimous or altruistic human nature. As James Madison trumpeted in *The Federalist* No. 51, "[I]f men were angels, no government would be necessary. If angels were to gov-

77. See, e.g., *State v. Benoit*, 417 A.2d 895 (R.I. 1980) (rejecting *Chambers v. Maroney*, 399 U.S. 42 (1970), and allowing warrantless investigatory search of vehicle seized and removed to police station); *Commonwealth v. Bussey*, 486 Pa. 221, 404 A.2d 1309 (1979) (rejecting *North Carolina v. Butler*, 441 U.S. 369 (1979), and requiring an explicit waiver of *Miranda* rights). For a discussion of the extra protections often afforded under state statutes and constitutions, see Greenhalgh, *Independence and Adequate State Grounds: The Long and Short of It*, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE 211 (B. McGraw ed. 1985).

78. See W. Brennan, *supra* note 4, at 9.

79. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 136 (1921).

ern men, neither external nor internal controls on government would be necessary."⁸⁰

The human dignity theory of constitutional interpretation requires the Nation to place ultimate trust in the benevolence, wisdom, and statesmanship of the Supreme Court. It is wholly irreconcilable with Alexander Hamilton's characterization of the judiciary in *The Federalist* No. 78 as the least dangerous branch and lacking authority to construe the Constitution according to its spirit.⁸¹ The original intent standard of constitutional interpretation transcends partisan politics. The standard may indirectly aid a liberal political agenda, as during the Presidency of Franklin D. Roosevelt, or a conservative political agenda, as during President Reagan's tenure in office. But the most important beneficiaries of the standard are the people and regime of law. When unelected federal judges make policy through inventive constitutional interpretations, political power is stolen from the citizenry.

Experience demonstrates that when the Supreme Court rejects the original intent theory to inform its constitutional pronouncements, the consequence is judicial lawlessness and frustration of legitimate legislative compromise. From the 1820 Missouri Compromise⁸² to the 1854 Kansas-Nebraska Act,⁸³ for instance, Congress struggled with the issue of slavery in the territories. While legislative compromises did not settle the slavery question, they held the Nation together. In violation of original intent, the Supreme Court decreed in *Dred Scott v. Sandford*⁸⁴ that Congress lacked constitutional power to prohibit slavery in the territories. As a result, legislative compromise was no longer possible, and the war came.

Faithful to original intent, Congress used a federal income tax to pay for the costs of the Civil War. In 1895, however, the Supreme Court held unconstitutional a federal income tax on income derived from real or personal property.⁸⁵ The decision aggravated class conflict within the country. And it would have disabled the United States from active participation in World War I for lack of revenue if the income tax amendment had not been ratified in

80. THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

81. THE FEDERALIST No. 78, at 521-30 (A. Hamilton) (J. Cooke ed. 1961).

82. Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545, 548.

83. Act of May 30, 1854, ch. 59, 10 Stat. 277, 277-90.

84. 60 U.S. (19 How.) 393 (1857).

85. *Pollack v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (1885).

1913.⁸⁶

The Supreme Court further accentuated division between labor and management by creating a due process right of contract to invalidate minimum wage, maximum hour, child labor, and unionization laws.⁸⁷ As a consequence, workplaces frequently resembled battlefields through the 1930s until the Court sustained the National Labor Relations Act.⁸⁸

Today some Justices insist that the death penalty is unconstitutional, despite overwhelming evidence that our constitutional authors intended capital punishment to be permissible. Legislators, executive officials, and juries have displayed commendable restraint and caution in considering death sentences. The public manifestly desires to retain capital punishment for particular crimes, as recent judicial elections in California confirm. A Supreme Court ruling defying original intent and striking down the death penalty would arouse public passions and perhaps provoke a backlash of draconian anticrime measures. That would be unfortunate for the evolution of enlightened criminal law policy.

In its ill-starred abortion rulings, the Supreme Court has strayed from original intent and damaged the public policymaking process. The Court conjured up a right of privacy in *Roe v. Wade*⁸⁹ to scuttle the responsible efforts of legislators to accommodate the interests of the fetus, mother, father, and minor children in abortion decisions. The Court ordained a virtually limitless right of the mother to an abortion and made all other interests subservient. The Nation has suffered political scars from the abortion decrees, and the people have lost power and genuine responsibility for debating and fashioning abortion policy.

Legislators are better suited than the courts to address contentious issues. Statutes can incorporate special rules or exemptions to satisfy the distinct needs or desires of constituent groups. While not intellectually tidy, statutes allow many contending theories of public policy to emerge partially victorious and can assuage a host of political demands. Policy thereby evolves in a way that avoids sharp breaks with the past so jarring to community tranquility.

Supreme Court decrees lack the suppleness of legislative ac-

86. U.S. CONST. amend. XVI.

87. See *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (minimum wage); *Lochner v. New York*, 198 U.S. 45 (1905) (maximum hour); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (child labor); *Coppage v. Kansas*, 236 U.S. 1 (1915) ("yellow dog" contracts).

88. See *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939).

89. 410 U.S. 113 (1973).

tion. They generally cannot accommodate special needs or circumstances that are commonplace in a heterogeneous nation. And they frequently cause unsettling upheavals in the legal landscape, such as in the school prayer decisions in the early 1960s.

The bipartisan nature of the original intent controversy is demonstrated by recounting President Franklin D. Roosevelt's use of national broadcasting to assail the Supreme Court's arrogation of policymaking power constitutionally assigned to Congress. President Roosevelt charged:

When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these Acts of Congress—and to approve or disapprove the public policy written into these laws.

We have . . . reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself . . . We want a Supreme Court which will do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men.⁹⁰

It speaks volumes that Justice Brennan relies on *Weems v. United States*,⁹¹ a case reflecting an interpretive doctrine that precipitated President Roosevelt's remonstrance against the Supreme Court, to justify an amorphous human dignity theory of constitutional interpretation. In *Weems* Justice McKenna wrote:

Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice John Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophesy can be made. In the application of a

90. F.D. Roosevelt, A "Fireside Chat" Discussing the Plan for Reorganization of the Judiciary in Washington, D.C. (Mar. 9, 1937), reprinted in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 122 (S. Rosenman comp. 1941).

91. 217 U.S. 349 (1910).

constitution, therefore, our contemplation cannot be only of what has been, but of what may be.⁹²

As Attorney General Edwin Meese has observed, the *Weems* ruling directly flouted Thomas Jefferson's teaching:

On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find], what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed.⁹³

Further, Justice McKenna ignored that Marshall was trumpeting the power of legislative, not judicial, authority to respond to new circumstances.⁹⁴

Finally, some insist that the Supreme Court should act as the Nation's moral conscience, irrespective of original intent. But Court decisions are legion that have aroused moral disapprobation: cases holding that blacks are barred from United States citizenship and can be excluded from party primary elections;⁹⁵ that Congress cannot proscribe slavery in territories, or racial discrimination in public places, or private acts of violence against black citizens;⁹⁶ that the Fugitive Slave Act was constitutional, but that state laws proscribing the use of force or violence in the capture of slaves were prohibited;⁹⁷ that women may be denied the franchise and access to the legal profession on account of gender, and may be stripped of American citizenship for marriage to an alien;⁹⁸ that segregation of blacks and citizens of Chinese ancestry in public institutions is constitutionally irreproachable;⁹⁹ that federal child labor laws and federal taxation of the net income derived from real or personal property are unconstitutional;¹⁰⁰ that citizens of Japanese ancestry

92. *Id.* at 373.

93. E. Meese, Address Before the D.C. Chapter of the Federalist Society, Lawyers' Division 6 (Nov. 15, 1985) (available at the *Maryland Law Review*).

94. *See id.* at 5.

95. *See* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

96. *See id.* at 396.

97. *See* *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

98. *See* *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (suffrage); *Bradwall v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (practice of law); *Mackenzie v. Hare*, 239 U.S. 299 (1915) (marriage to alien).

99. *See* *Cumming v. County Bd. of Educ.*, 175 U.S. 528 (1899) (exclusion of black student from white public school); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (exclusion of Chinese student from white public school).

100. *See* *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (child labor); *Pollack v. Farmer's Loan & Trust Co.*, 155 U.S. 429 (1895) (income tax).

may, without evidence of disloyalty, be forcibly relocated during wartime;¹⁰¹ that constitutional due process bars minimum wage and maximum hour regulation and statutes condemning "yellow dog" contracts;¹⁰² that restrictions on an employer's right to enjoin strikes violate equal protection norms, and that labor boycotts violate the Sherman Act;¹⁰³ that school children can be compelled to salute the flag;¹⁰⁴ that citizenship should be denied an elderly pacifist female immigrant for refusal to bear arms;¹⁰⁵ that the mentally retarded may be sterilized involuntarily;¹⁰⁶ that states may prohibit Japanese aliens ineligible for United States citizenship from owning land;¹⁰⁷ and that a law could apply retroactively to exclude from the United States Chinese laborers who departed the country when the law entitled them to re-entry.¹⁰⁸

The list must stop as a concession to the shortness of life. But do these decisions embody the moral conscience of our Nation?

Moreover, even if the Supreme Court decisions misconstruing the Constitution seem temporarily to advance some higher morality or public good, they still blemish our legal order and endanger law. As Sir Thomas More is said to have explained:

The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you think you could stand upright in the winds that would blow them?¹⁰⁹

101. See *Korematsu v. United States*, 323 U.S. 214 (1944).

102. See *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (minimum wage); *Lochner v. New York*, 198 U.S. 45 (1905) (maximum hour); *Coppage v. Kansas*, 236 U.S. 1 (1915) (contracts forbidding employees to join union).

103. See *Truax v. Corrigan*, 257 U.S. 312 (1921) (right to enjoin strikes); *Loewe v. Lawlor*, 208 U.S. 274 (1908) (Sherman Act).

104. See *Minorsville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

105. See *United States v. Schwimmer*, 279 U.S. 644 (1929).

106. See *Buck v. Bell*, 274 U.S. 200 (1927).

107. See *Porterfield v. Webb*, 263 U.S. 225 (1923).

108. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (The Chinese Exclusion Case).

109. *TVA v. Hill*, 437 U.S. 153, 195 (1978) (quoting R. Bolt, *A Man for All Seasons*, Act I, p. 147 (Three Plays, Heinemann ed. 1967)).

Thus, Judge Bork is surely correct in avowing "that only by limiting themselves to the historic intentions underlying each clause of the Constitution can judges avoid becoming legislators, avoid enforcing their own moral predilections, and ensure that the Constitution is law."¹¹⁰

110. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 *SAN DIEGO L. REV.* 823, 832 (1986) (address before the University of San Diego School of Law).